Ban Chuan Trading Co Sdn Bhd & Ors v Ng Bak Guan

HIGH COURT (PENANG) — CIVIL SUIT NO 22–173–93
VINCENT NG J
5 SEPTEMBER 1995

***Contract** — Damages — Ascertainment — Breach of tenancy agreement — Loss of profits — General and special damages — Whether duty to mitigate losses*

The plaintiff was operating a business at Province Wellesley at the time when he entered into the tenancy agreement with the defendants. The defendants failed to hand over vacant possession of property to the plaintiff after executing a tenancy agreement. The tenancy agreement dated 1 October 1991 was for the period of three years with effect from 1 October 1991 to 31 October 1994

This was the defendants' appeal against the decision of the senior assistant registrar on 15 October 1994 awarding the plaintiff a total sum of RM114,400 as loss and damages for breach of contract by the defendants. The assessment of damages arose out of an order of court dated 15 September 1993 which ordered that the tenancy agreement between the plaintiff and the defendants be rescinded and that the defendants pay damages to the plaintiff with interest to be assessed by the senior assistant registrar.

Held, dismissing the defendants' appeal against the award on general damages and allowing the appeal in respect of the award on special damages:

(1) The ascertainment of damages was an exercise to establish a question of fact, that is what loss and damage had been suffered by the plaintiff in the particular case before the court, and to award him damages ascertained according to these principles.

(2) The senior assistant registrar's assessment of loss of profits at RM97,200 was confirmed. The three years income tax returns could be taken as evidence of the net income of the plaintiff's existing business. Further, the senior assistant registrar was right to impose a 20% top up on the three years average income as the plaintiff had given adverse evidence on this score; and the senior assistant registrar had correctly relied on the second limb of s 74 of the Contracts Act 1950 in the assessment as there was enough evidence that the defendant was much aware that the plaintiff would incur damages if the contract for the three-year tenancy of the premises was rescinded.

(3) Concerning the plaintiff's duty to mitigate losses, the senior assistant registrar could not be faulted for assessing damages for the full three years agreed term as the defendants never

categorically informed the plaintiff orally or in writing that the tenancy of the said premises could not given to him. A

(4) Furthermore, as there was uncontested evidence before the senior assistant registrar that the plaintiff had been forced to sell the furniture in April 1992, which had been parked in the workshop of the carpenter, this event should not be taken to shift responsibility onto the plaintiff to also then look for an alternative business outlet in mitigation or reduction of the full length of the tenancy period that the plaintiff was entitled to claim under the said contract. B

[Bahasa Malaysia summary C

Plaintif menjalankan satu peniagaan di Seberang Perai pada masa beliau mengikat satu perjanjian penyewaan dengan defendan. Defendan gagal memberikan milikan kosong hartanah itu kepada plaintif selepas melaksanakan perjanjian penyewaan itu. Perjanjian penyewaan bertarikh 1 Oktober 1991 itu adalah untuk tempoh tiga tahun bermula dari 1 Oktober 1991 sehingga 31 Oktober 1994. D

Ini adalah rayuan defendan terhadap keputusan penolong kanan pendaftar pada 15 Oktober 1994 mengaward plaintif sejumlah RM114,400 sebagai kerugian dan ganti rugi untuk keingkaran kontrak oleh defendan. Pentaksiran ganti rugi timbul daripada suatu perintah mahkamah bertarikh 15 September 1993 yang memerintahkan bahawa perjanjian penyewaan di antara plaintif dan defendan dibatalkan dan bahawa defendan membayar ganti rugi kepada plaintif dengan bunga yang akan ditaksir oleh penolong kanan pendaftar. E F

Diputuskan, menolak rayuan defendan terhadap award ganti rugi am dan membenarkan rayuan berkenaan dengan award ganti rugi khas:

(1) Penentuan ganti rugi adalah satu gerak kerja untuk memastikan satu soalan fakta, yakni apakah kerugian dan kerosakan yang telah dialami oleh plaintif di dalam kes di depan mahkamah ini, dan untuk mengaward kepadanya ganti rugi yang ditentukan mengikut prinsip-prinsip ini. G

(2) Pentaksiran kerugian keuntungan oleh penolong kanan pendaftar sebanyak RM97,200 disahkan. Penyata cukai pendapatan tiga tahun boleh diambil sebagai keterangan pendapatan bersih perniagaan plaintif. Lagipun, penolong kanan pendaftar berhak mengenakan tambahan 20% ke atas purata pendapatan tiga tahun ini kerana plaintif telah memberikan keterangan bertentangan berkenaan isu ini; dan penolong kanan pendaftar telah bergantung dengan betul kepada cabang kedua s 74 Akta Kontrak 1950 dalam pentaksiran kerana terpadat keterangan yang mencukupi H I

bahawa defendan sedar yang plaintif akan mengalami kerugian jika kontrak untuk penyewaan tiga tahun premis itu dibatalkan.

(3) Berkenaan dengan tugas plaintif untuk mengurangkan kerugian, penolong kanan pendaftar tidak boleh disalahkan kerana mentaksir ganti rugi untuk sepenuh tempoh tiga tahun yang dipersetujui kerana defendan dengan jelas memberitahu plaintif secara lisan atau bertulis bahawa penyewaan premis itu tidak boleh diberikan kepadanya.

(4) Tambahan pula, oleh kerana terdapat keterangan yang tidak dicabar di depan penolong kanan pendaftar bahawa plaintif telah dipaksa menjual perabot pada April 1992 yang disimpan di dalam bengkel tukang kayu, ini tidak boleh diambil untuk memindahkan tanggungjawab kepada plaintif supaya mencari tempat perniagaan alternatif untuk mengurangkan tempoh penuh penyewaan yang plaintif berhak membuat tuntutan di bawah kontrak itu.]

Notes

For cases on damages for breach of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1442–1494.

Case referred to

Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd [1993] 1 SLR 73 (folld)

Legislation referred to

Contracts Act 1950 s 74

Cheah CK (*Cheah Choo Kheng*) for the plaintiff.
Walter BC Teoh (*Saw & Teoh*) for the defendants.

Vincent Ng J: This was the defendant's appeal against the decision of the learned senior assistant registrar given on 15 October 1994 in awarding the plaintiff a total sum of RM114,400 as loss and damage for breach of contract by the defendant. The assessment of damages arose out of an order of court dated 15 September 1993 which ordered that a written tenancy agreement dated 1 October 1991 between the plaintiff and the defendants be rescinded and that the defendants pay damages to the plaintiff with interest to be assessed by the SAR.

The plaintiff had been operating a business at Tokong Lane, Bukit Mertajam, Province Wellesley (the existing business outlet) at the time when he entered into the tenancy agreement with the defendants. The defendants had failed to hand over vacant possession of property to the plaintiff after executing a tenancy agreement. The tenancy agreement dated 1 October 1991 was for the period of three years wef 1 October 1991 to 31 October 1994 in respect of premises No 209 Jalan Pasar,

14000 Bukit Mertajam, Province Wellesley Central (the intended business outlet). The RM114,400 comprised RM 97,200 as general damages for loss of profits for the period from 1 November 1991 to 31 October 1994 (with interest) and RM 17,200 as special damages for loss on the purchase of furniture.

At the outset it must be borne in mind that neither before me nor before the senior assistant registrar did the appellants/defendants raise the question of whether the plaintiff's loss ought to be the differential in income, if any, that he had earned from his existing business outlet as compared to the income he would have earned for three years in the intended business outlet. Consequently, the defendants/appellants' grounds were only confined to the following:

(a) The loss of profits should have been awarded for a period up to April 1992 because the cabinets, which were custom-made for the premises, were disposed of somewhere around that time and the plaintiff should also then have, in mitigation of damages, tried to look for alternative place to commence his intended business outlet.

(b) The senior assistant registrar had based his assessment on the evidence of the plaintiff himself, Mr Ng Bak Guan, the manager of the first defendant company, Mr Low Tek Hong, together with the three Income Tax Borang J on the income from the existing business outlet (adduced in evidence as P1, P2 and P3) which is insufficient to prove loss of profits.

(c) There should not be 20% top up on the annual income in respect of the existing business outlet premises.

(d) The learned senior assistant registrar should not have allowed the plaintiff's claim for both general and special damages.

I allowed the defendants' appeal on special damages as per (d) above in respect of purchase of furniture but dismissed their appeal on general damages in respect of loss of profits.

In so far as the potential guidance offered by previous precedents on the question of ascertainment of damages is concerned, the following pertinent general observations by Warren LH Khoo J, delivering the judgment of the Singapore Court of Appeal in *Hong Fok Realty Pte Ltd v Bima Investment Pte Ltd* [1993] 1 SLR 73 (reversing (in part) [1990] 2 MLJ 193) should be noted:

> It must be borne in mind ... that the ascertainment of damages is an exercise to establish a question of fact, that is what loss and damage have been suffered by the plaintiff in the particular case before the court, and to award him damages ascertained according to these principles. Decided cases are useful more for the principles they enunciate, than for the result of the application of the principles. (See Cheshire and Fifoot and Furmston's *Law of Contract* (Singapore and Malaysian Ed, 1994) p 847.)

I confirmed the senior assistant registrar's assessment of loss of profits at RM97,200 for the following reasons.

The senior assistant registrar had assessed the loss of profits for three years as the lease was for the period from 1 October 1991 to 31 October 1994 and had based the quantum on the plaintiff's average per annum income for three years as evidenced by the three income tax Form J returns in P1 being RM17,558, P2 being RM 31,661 and P3 being RM 30,280. In my view the income tax returns under Form J (which covered only his business) could be taken as evidence of the net income of the plaintiff's existing business. This ought to be so because it is inconceivable for anyone to declare higher than his true income, as that would entail his having to pay more on income tax.

The senior assistant registrar was also right to impose a 20% top up on the three years average income gleaned from P1, P2 and P3, as the plaintiff himself had given adverse evidence on this score, when he admitted as follows:

> Saya setuju dengan cadangan peguam plaintiff bahawa secara konservatif minimum lebih kurang 20% keuntungan boleh didapati lebih berniaga di Jalan Pasar berbanding dengan Tokong Lane untuk retail business.

The senior assistant registrar has correctly, in my opinion, relied on the second limb of s 74 of the Contracts Act in his assessment, as there was enough evidence before him that the defendant was much aware that the plaintiff would incur damages if the contract for the three-year tenancy of the said premises is rescinded.

Concerning ground (a) above, ie the plaintiff's duty to mitigate losses, the senior assistant registrar cannot be faulted for assessing damages for the full three years agreed term, as the defendant never categorically informed the plaintiff orally or in writing that the tenancy of the said premises could not given to him. Indeed, according to the evidence, on 1 November 1991, when the plaintiff was told that the defendant was having problems with the then existing tenant the plaintiff said that he was willing to wait until that problem was resolved. It is important to note here that the reaction of the defendant to this statement gave the plaintiff the impression that he could continue to wait, and he had probably waited because the intended business outlet was (even according to the evidence of DW1) a better business premises with prospects of around 20% appreciation in profits. Thus, his state of mind: 'Saya tidak cuba cari premis lain selain lot 209 Jalan Pasar, saya tunggu premis diatas kerana saya telah buat perjanjian dengan defendan' is highly reasonable, under the circumstances.

Furthermore, as there was uncontested evidence before the senior assistant registrar that the plaintiff had been forced to sell the furniture in April 1992, which had been parked in the workshop of the carpenter named Mr Loh Ngen Loi (PW2), this event should not be taken to shift responsibility onto the plaintiff to also then look for an alternative business outlet in mitigation or reduction of the full length of the tenancy period that the plaintiff was entitled to claim under the said contract.

For the above reasons, I dismissed the appellants/defendants appeal in respect of the senior assistant registrar's award on general damages at RM97,200 and allowed their appeal in respect of the award on special damages at RM17,200. As the appellants/defendants had succeeded in part, I made no order as to costs of this appeal.

Order accordingly.

Reported by Richard Leung